

Participant-Directed Services and Supports in Kansas

What changes are happening in Kansas?

Participant-Direction in Kansas

- Kansas HCBS Medicaid Waivers allow individuals to “self-direct” some or all of their in-home supports.
- Kansas law, KSA 39-7,100 and KSA 65-6201, supports this right for individuals with disabilities.
- Participant-Direction means that the participant or his/her representative has the right to hire, train, schedule, supervise and employ Direct Service Workers (DSW's) to work with the participant in his/her home and community.

Financial Management Services (FMS)

- If a participant wants to self-direct his/her services, that person will also work with an approved KDADS and KanCare provider, known as a Financial Management Services (FMS) provider.
- The FMS provider provides administrative support to the participant, including payroll processing, running background checks, maintaining employment files on DSW's, and ensuring that all required employment taxes and insurance are paid on behalf of the self-directing participant.

Changes in Participant-Direction

- Kansas is required to get approval for all Medicaid HCBS Waiver services from the federal government – the Centers for Medicare and Medicaid Services (CMS).
- All HCBS Waivers are currently being reviewed by CMS for proposed changes.
- One of the changes taking place is to ensure that participants who self-direct are recognized as the Common Law Employer of his/her DSW's to support Kansas Self-Direction laws.
- This means that FMS providers are (or will be) working with participants to help them obtain a Federal Employer Identification Number (EIN).

Why the Change?

- The change is being made to support the participant as the sole common law employer of his/her DSW's.
- The change is being made to recognize that Kansas has self-direction laws in place that identify the participant as the sole employer of the DSW's.
- The changes being made are due to CMS instructions to Kansas to choose the more appropriate self-direction model that is consistent with Kansas laws.

Other Important Changes

- The HCBS Waiver renewals contains other changes to Participant-Direction rules and services that are important to note. These changes will take effect after CMS approval:
 - DSW's will need to be at least 18 years old and/or have a High School Diploma or equivalent (G.E.D.) for all waivers in order to be employed by the Participant.
 - Comprehensive backgrounds checks will be required for **all** DSW's on **all** waivers.
 - Proposal to remove the 20 hour DSW training option and removal of the 14-day hospital retainer option from the I/DD Waiver.
 - Maximum daily hours on the I/DD Waiver will be changed to 12 hours per day maximum – no more “average” totals will be allowed (i.e. 14 hours one day, 10 hours the next, to “average” 12 hours).
 - New reporting guidelines for legal guardians working as DSW's.

Department of Labor & Companionship Exemption

- In 2014, the Federal Department of Labor finalized changes that would require all DSW's working over 40 hours per week to be paid overtime starting this year.
- That rule was challenged in a U.S. Federal Court and was overturned, so no changes to overtime on HCBS waivers have been made at this time in Kansas.
- The Federal Department of Labor decided to appeal the U.S. Court's decision.
- No changes are being made at this time regarding overtime for DSW's.
- A decision from the court appeal could come by Summer 2015.

The Move to the Vendor Fiscal/Employer Agent FMS Model

- Kansas operates a “hybrid” model of Participant-Direction – so the Kansas Model did not completely fit with the definitions provided by the Centers for Medicare and Medicaid (CMS).
- KDADS officials worked with CMS to determine how the Kansas Participant-Direction model would best fit into the CMS HCBS Waiver Applications.
- CMS determined that Kansas fit better in the Vendor Fiscal/Employer Agent (F/EA) model than in the Agency with Choice (AWC) model.

The Agency with Choice Model

- In 2011, Kansas HCBS waivers began operating under the Agency with Choice (AWC) self-direction model.
- This model did not require participants to obtain a separate tax ID number, so the AWC FMS provider handled all tax, insurance and with-holdings under the FMS's tax ID number.
- Federal changes, such as the Affordable Care Act and the Department of Labor's Joint Employment definitions, made it clear that the AWC model was not the right choice for Kansas participants and did not support the Kansas Self-Direction laws.

Researching the Options for FMS

- In 2013, a group of FMS providers and KDADS representatives attended a National Participant-Direction Conference to gain information and resources on the potential concerns that were being identified if Kansas did not change from the AWC model to the Vendor Fiscal/Employer Agent model to support self-direction in Kansas.
- The potential limitations and penalties to both participants and FMS providers under the AWC model would have negatively impacted participant-direction in Kansas and would have been in conflict with Kansas self-direction laws.

Kansas FMS Workgroup

- KDADS created a workgroup of FMS providers from across the state, and the group began meeting in 2012 to discuss participant-direction and FMS concerns with the State.
- In 2013, the FMS workgroup focused on issues relating to the usage of Kansas AuthentiCare®, implementation of the HCBS waivers in KanCare, provider contracting with KanCare MCO's, and the potential impact of federal changes in health care mandates and overtime.
- In 2014, the FMS workgroup identified that the federal concerns about health care and overtime were two very important issues to participant-direction in Kansas, and that a change in the FMS model was necessary.

The Vendor Fiscal/Employer Agent (F/EA) FMS Model

- The Vendor F/EA model is what the FMS workgroup recommended to KDADS in order to provide a clear definition that the Participant is the Common Law Employer of the DSW's, and that the FMS acts as the "Agent" of the Participant and not the DSW.
- The FMS workgroup also felt that the Kansas Self-Direction laws and history were unique to our state and the workgroup wanted to retain the support provided in our current system, which includes the provision of Information and Assistance (I&A) to the Participant, despite the move to a new FMS model.

Kansas Participant-Direction Defined

- Per the HCBS Waiver Applications submitted to CMS by KDADS, the definition of participant-direction in Kansas is as follows:
- “Kansas operates a hybrid model between the Agency with Choice FMS model and the Vendor Fiscal Employer Agent (F/EA) model of financial management services.
- This provides participants with control and independence to employ direct service workers (DSWs) and provides participants with information and assistance to ensure they have support in their role as the employer of the direct service workers.”

Financial Management Services Definition

- Financial Management Services (FMS) is an HCBS service available for the participant or designee (a designated person assigned by the participant, such as a representative, family member, parent, spouse, adult child, guardian) who has chosen to participant-direct some or all services, to assist the participant by performing administrative and payroll functions, and providing Information and Assistance.
- In Kansas, FMS support will be provided within the scope of the Fiscal/Employer Agent (F/EA) model. FMS service is available to participants who reside in their own residence or in the home of a family member and have chosen to participant-direct their services.

FMS Role in the new F/EA Model

- In the F/EA model, the participant retains the responsibility as the employer.
- FMS supports will be provided through a third party entity that has an established provider agreement with the Secretary of KDADS and is contracted with a KanCare managed care organization (MCO).
- The FMS provider will support the participant in accordance with terms specified in the KDADS FMS agreement and FMS Provider manual.

Important F/EA FMS Features

- In support of the independence, choice and control of the participant and independent living philosophy, the FMS functions as an administrative support and as a fiscal service entity to reduce the employer-related burden and enhance choice and control for participant employers.
- To that end, the FMS recognizes the rights of participant-employers to self-direct their care.
- FMS providers should remain neutral with regard to employment decisions reserved for participant-employers.
- Employment decisions made by participant-employers include, but are not limited to, independently hiring, training, directing, managing, supervising and dismissing employees.

Participant/Employer Defined

- A Common Law Employer is, under common law rules, an individual or organization that has the right to direct and control how a person (engaged by an individual/organization) performs the services provided.
- This control refers not only to the result to be accomplished (outcome) by the work but also the means and details by which those results are accomplished, even if the employer gives the person he/she engages freedom of action.

Direct Service Worker (DSW) Defined

- A DSW is an individual who meets the requirements as described in an HCBS waiver or program standards and is employed by the participant to provide assistance and support to the participant, such as personal care services, in accordance with the participant's Integrated Service Plan/Plan of Care.
- An Employee is, under common law rules, anyone who performs services for a person or organization where the person/organization has the right to direct and control what will be done and how it will be done.
- This control refers not only to the result to be accomplished (outcome) by the work but also the means and details by which that result is accomplished, even if the person/organization gives the individual they engaged freedom of action.

Financial Management Service Defined

- Financial Management Services (FMS) is a service that provides payroll, invoice processing and payment, fiscal reporting services, employer orientation and skills training, and other fiscal-related and administrative services to participants choosing to exercise employer authority through self-direction under an HCBS Program.
- FMS providers in Kansas will operate as a Vendor Fiscal/Employer Agent (F/EA) in accordance with §3504 of the IRS code and Revenue Procedure 70-6 and 80-4, respectively, as modified by IRS Proposed Notice 2003-70.

Vendor Fiscal/Employer Agent Defined

- Vendor Fiscal/Employer Agent (F/EA) is a vendor entity that applies for and receives approval from the Internal Revenue Service (IRS) to be an employer agent, in accordance with §3504 of the IRS code, Revenue Procedure 70-6, 1970-1 C.B. 420, as modified by Proposed Notice 2003-70, on behalf of participants performing all that is required of an employer for wages paid on their behalf and all that is required of the payer for the requirements of back-up withholding, as applicable.
- The FMS performs other fiscal and reporting tasks as required by KDADS.

Steps to Becoming a Participant Employer

- The HCBS Participant will work with his/her chosen FMS provider to complete the necessary and required IRS and state applications in order to obtain Employer Tax Identification numbers.
- The FMS provider will offer Information and Assistance (I&A) to the Participant in completing all required employer forms and applications.
- The FMS provider will submit all required forms to the proper agencies in order to assist the Participant in obtaining the required tax identification numbers.

Required Forms

- Per IRS rules governing Participant-Directed Programs, the following forms are required prior to the Participant hiring any Employees:
 - IRS Form SS-4, Application for Employer Identification Number
 - IRS Form 2678, IRS Appointment of Agent
 - IRS Form 8821, Tax Information Authorization
 - IRS Form 941, Employer's Quarterly Federal Tax Return
 - IRS Form Schedule R for Form 941, Allocation Schedule for Aggregate Form 941 Filers
 - IRS Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return
 - IRS Form Schedule R for Form 940, Allocation Schedule for Aggregate Form 940 Filers
 - Form W-2, Wage and Tax Statement

IRS Form SS-4

Application for Employer Identification Number

- Purpose: Apply to IRS to obtain Employer Identification Number (EIN) for a participant employer or representative serving as employer of participant's employees.
- Completed when: Form should be completed prior to hiring workers.
- Completed by: Participant Employer

IRS Form SS-4

Frequently Asked Questions

- Can the FMS obtain EINs online? **Yes, the IRS allows EINs to be obtained on behalf of the Participant online.**
- If a Participant has a guardian or representative, who should hold the EIN? **The IRS has confirmed that whenever possible the participant should be the employer. It is however, allowable for the guardian or representative to be the employer, but not preferred by the IRS.**
- Does the IRS allow minors to hold the EIN? **Yes.**
- Can the EIN holder be a paid DSW? **No; if the Employer is also the paid DSW, that would make the person self-employed. By design F/EAs are not equipped to handle these situations. This scenario also creates a conflict of interest.**
- What if the applicant already has an EIN for other business purposes? **The IRS will not grant a second EIN? It does not cause a problem for the FMS to use an existing EIN. The FMS will not take on liability for the participant's business because the IRS uses a combination of the participants EIN plus the FMS EIN.**

IRS Form 2678

Employer Appointment of Agent

- Purpose: Participant requests approval from the IRS to have the FMS file returns and make deposits of employment and withholding taxes, and the form is also used to revoke an existing appointment.
- Completed when: This form should be completed before wages are paid to the participants employees.
- Completed by: Page 1 is completed by the Participant Employer, and Page 2 is completed by the FMS.

IRS Form 2678

Frequently Asked Questions

- When should the 2678 be used to revoke an appointment?
 - **The 2678 should not be revoked until all tax payments, with which the FMS is responsible for handling, have been deposited and reported.**
 - **Best practice is to wait until after all reporting is completed for the fiscal year.**

IRS Form 8821

Tax Information Authorization

- Purpose: Participant Employer designates the FMS to inspect and receive employer tax information.
- Completed When: This document is not required, however it can be useful and much easier, when getting information from the IRS about employer's taxes.
- Completed by: Participant Employer
- Additional Information: The 8821 appointment is only granted for 3 years. After 3 years a new 8821 would be required to continue the appointment.

IRS Form 941

Employer's Quarterly Federal Tax Return

- Purpose: The FMS files FICA (Medicare and Social Security Taxes) and Federal Income tax withholding quarterly in aggregate for all participant employers that the FMS represents.
- Completed When: Quarterly for any quarter in which the FMS paid wages for employees serving participants.
- Completed by: FMS

IRS Form Schedule R for Form 941

Allocation Schedule for Aggregate Form 941 Filers

- **Purpose:** The FMS files this schedule with the Form 941 to show the 941 detail data for each employer the FMS represents. Each participant's employer's EIN is required on this Form. The only acceptable formats for a Schedule R are the form produced by the IRS.
- **Completed When:** Whenever a 941 is filed. If a 941x (Adjusted employer quarterly tax return) is filed, a Schedule R is completed then as well.
- **Completed by:** FMS

IRS Form 940

Employer's Annual Federal Unemployment (FUTA tax return)

- Purpose: The FMS files FUTA annually in the aggregate for all participant employers the FMS represents.
- Completed When: Annually for any year in which the FMS paid wages for employees serving participants.
- Completed by: FMS

IRS Form Schedule R for Form 940

Allocation Schedule for Aggregate Form 940 Filers

- Purpose: The FMS files this schedule with the Form 940 to show the 940 detail data for each employer the FMS represents.
- Each participants employer's EIN is required on this Form.
- The only acceptable formats for a Schedule R are the form produced by the IRS.
- Completed When: With the annual 940.
- Completed by: FMS

W-2 Wage and Tax Statement

- Purpose: Report annual wage and tax information for each employee who serves a participant employer. If the FMS agent files 250 or more IRS Forms W-2, the FMS must file electronically using the Social Security Administration's Business Services Online.
- Completed when: Annually after each tax year. Must be issued to employees by January 31st. Must be submitted to IRS/SSA by February 28 if by paper, and by March 31st if filing electronically.
- Completed by: FMS

W-2 Wage and Tax Statement

Frequently Asked Questions

- What name and Employer's Tax ID should be on the W-2?
 - **Box B (Employer Identification):** Should be the FMS' special/separate EIN.
 - **Box C (Employer's Name and Address):** Should be the FMS name + "for <<participant employer's name>>. The address should be the FMS address.
 - **Box 15b (Employers state ID number):** Should be the participant employer's individual State Income Tax withholding account number, unless the FMS has an arrangement with the State to file and pay State Income Tax Withholding in aggregate.
- What if an employee works for more than one participant?
 - **The FMS must issue a separate Form W-2 for each participant employer/employee relationship.** For example, a DSW employee works for three different participant employers, the employee would receive three separate W-2s.

Mandatory Exemptions under F/EA Model

- Certain family employee relationships are exempt from contributing to Social Security and Medicare (FICA).
- Certain family employee relationships are also exempt from Federal Unemployment Tax (FUTA) contributions.
- If an employee meets the established IRS criteria for these exemptions, the exemptions are mandatory and not voluntary.

State Forms and Issues

- Kansas FMS providers will either help individual Participant Employers set up individual Kansas with-holding Accounts and state unemployment accounts.
- - OR -
- Kansas FMS providers have the option to continue handling state with-holdings and state unemployment in the aggregate.
- FMS providers should consult with their tax professional and the Kansas Dept. of Revenue to discuss their options in order to make an informed decision.

Individual State Accounts

- If an FMS sets up individual state with-holding and SUTA accounts for Participant Employers, employers with certain family relationships may be exempt from paying into state unemployment.
- Pros – potential to increase DSW wage to qualifying employees
- Cons – increased administrative overhead to manage individual accounts for each Participant Employer
- Kansas does not have a stream-lined process like the IRS Schedule R that allows for aggregate deposits that are later individually defined by this special report.

Aggregate State Accounts

- If an FMS provider chooses to continue making deposits and paying into SUTA in the aggregate for all Participant Employers, they can do so under their new IRS Reporting Agent EIN.
- Contact the Kansas Dept. of Revenue to transfer existing DSW SUTA funds to the new account. This transfer will keep the SUTA rate at the existing rate of the FMS agent.
- Pros: the FMS provider will be managing one SUTA account for all DSW required contributions
- Cons: there would be no SUTA exemptions for certain family relationships with an FMS aggregate SUTA account.

Where to get more Information?

- It is vital that FMS providers stay current on IRS and state tax issues relating to Participant-Directed services.
- The National Resource Center for Participant-Directed Services (NRCPDS) is a membership organization for FMS providers and state agencies in the U.S.
- The NRCPDS provides trainings and information on Best Practices for Participant Direction programs.
- Learn more about the NRCPDS at www.participantdirection.org

Self-Direction Care Providers of Kansas (SDCPKS)

- In 2014, FMS providers in Kansas began working together to discuss changes to the self-direction programs in Kansas and the changing role of the FMS provider in HCBS Waiver Programs.
- In 2015, the group voted to form a membership provider network open to Kansas FMS providers.
- To learn more about membership and activities of the SDCPKS group, please see their booth in the Exhibit Hall at this Summit.

Thank You!

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